

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS REDDICK,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No.: 16-cv-29-BTM-BLM

ORDER GRANTING MOTION FOR RECONSIDERATION

[ECF Nos. 28, 29]

Pending before the Court is a Motion for Reconsideration of the Court's Order awarding attorney's fees from Plaintiff's recovery of past-due social security benefits. (ECF No. 26). Plaintiff's counsel ("Counsel") argues that the Court's decision is legally erroneous and raises issues of law and fact not before it. (ECF No. 29 at 1). For the reasons set forth below, the Court GRANTS the Motion.

I. BACKGROUND

On July 15, 2016, the Court granted Plaintiff's Motion for Summary Judgment, denied Defendant's Cross-Motion for Summary Judgment, and remanded this action for further administrative proceedings. (ECF No. 17). The

1 Court also granted the parties' motion for attorney's fees under the EAJA in the
2 amount of \$3,850. (ECF Nos. 20, 21).

3 On remand, the Administrative Law Judge (ALJ) found Plaintiff was
4 disabled and awarded Plaintiff \$221,000 in past-due disability benefits. (ECF No.
5 22-3) The Notice of Award informed Plaintiff that he was entitled to monthly
6 benefits from January 2011 onward, and that \$55,250 of those past-due benefits
7 would be withheld in the event that Counsel requested attorney's fees for work
8 performed before this Court. (ECF No. 22-4).

9 In May 2018, Counsel requested \$43,000 in attorney's fees pursuant to a
10 contingent-fee agreement in which Plaintiff agreed to give Counsel 25% of any
11 past-due benefits award. (ECF No. 22-2). On March 11, 2019, the Court
12 awarded Counsel \$23,333.51 in attorney's fees for the 21.6 hours Counsel spent
13 representing claimant before this Court. (ECF No. 26).

14 Counsel timely moved for reconsideration. (ECF No. 29). The Court
15 invited responsive briefing from Plaintiff, who did not respond, and the Social
16 Security Commissioner. (ECF No. 31). The Commissioner took no position on
17 the Motion for Reconsideration, instead reiterating her previous analysis of the
18 requested fees and stating "it is up to the Court to determine whether Counsel's
19 requested hourly rate is reasonable." (ECF No. 32 at 2). Counsel replied,
20 arguing "the Commissioner's suggestion that this Court can or should set an
21 hourly rate is wrong." (ECF No. 33 at 2).

22 **II. LEGAL STANDARD**

23 Federal Rule of Civil Procedure 59(e) permits a party to move to alter or
24 amend a judgment within 28 days of the judgment's entry. Reconsideration is an
25 "extraordinary remedy, to be used sparingly." *Kona Enter., Inc. v. Estate of*
26 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Reconsideration may be appropriate
27 if "(1) the district court is presented with newly discovered evidence, (2) the
28 district court committed clear error or made an initial decision that was manifestly

1 unjust, or (3) there is an intervening change in controlling law.” *United Nat’l Ins.*
2 *Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009) (citation
3 omitted). “Clear error occurs when ‘the reviewing court on the entire record is left
4 with the definite and firm conviction that a mistake has been committed.’” *Smith*
5 *v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (quoting *United States*
6 *v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

7 **III. DISCUSSION**

8 The Court reduced the requested award because the Court considered
9 \$43,000 for 21.6 hours of work a windfall. (ECF No. 26 at 3-4). The Ninth Circuit
10 and United States Supreme Court permit district courts to reduce requested fee
11 awards if the attorney’s fees are not in proportion to time spent on the case, so
12 long as the Court respects the contingent nature of the representation and uses
13 the lodestar as an aid rather than a starting point in ascertaining reasonableness.

14 See *Crawford v. Astrue*, 586 F.3d 1142, 1151 (9th Cir. 2009) (en banc) (“The
15 court may properly reduce the fee for substandard performance, delay, or
16 benefits that are not in proportion to the time spent on the case.”) (citing
17 *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002)). After considering the record
18 and fees awarded in similar cases, the Court adjusted the lodestar to account for
19 the risk Counsel assumed. (ECF No. 26 at 5-7). The resulting award was
20 \$23,333.51 for 21.6 hours of work, or 10.6% of the \$221,000 in past-due
21 benefits. (ECF No. 26 at 7).

22 However, the Court is now persuaded that this approach was erroneous
23 under *Crawford*. See *Crawford*, 586 F.3d at 1150-52. Like the district courts in
24 *Crawford*, the Court arrived at a final “reasonable” award by adjusting upward
25 from a lodestar, which is impermissible. *Id.* at 1145-46, 1151. But perhaps most
26 significantly, the Court erred by failing to consider the full extent of risk borne by
27 contingency fee attorneys in social security cases. As the Ninth Circuit
28 explained, “[l]odestar fees will generally be much less than contingent fees

1 because the lodestar method tends to under-compensate attorneys for the risk
2 they undertook in representing their clients." *Id.* at 1150. This includes "the risk
3 that no benefits would be awarded or that there would be a long court or
4 administrative delay in resolving the cases." *Id.* at 1152. Given the deferential
5 standard of review, these cases are hard to win. Counsel bore that risk, and has
6 waited years for payment. The Court thus concludes the requested fee was not
7 a windfall, and that the Court's decision to reduce the requested attorney's fee
8 award by 43% failed to respect the primacy of the lawful contingent fee
9 agreement and was made in error. Because none of the *Gisbrecht* factors weigh
10 in favor of a reduction, and because Counsel requested 19.45% of past-due-
11 benefits, which falls below the 25% statutory cap, the Court further concludes the
12 requested \$43,000 fee is reasonable. See *Culbertson v. Berryhill*, 139 S.Ct. 517,
13 519, 521 (2019) (holding that 42 U.S.C. § 406(b)'s 25% cap on attorney's fees
14 does not limit the aggregate fees awarded for representation before both the
15 agency and the court).

16 **IV. CONCLUSION**

17 The Court GRANTS the Motion for Reconsideration. Counsel has already
18 received \$23,333.51 in attorney's fees and reimbursed Plaintiff \$3,850, the
19 amount paid by the government under the EAJA. (ECF No. 33 at 4). The Court
20 awards an additional \$19,666.49 attorney's fees to Brian C. Shapiro, for a total
21 award of \$43,000.

22 **IT IS SO ORDERED.**

23 Dated: *May 30, 2019*

24 
25 Honorable Barry Ted Moskowitz
26 United States District Judge
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